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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1249

JAMES V. SIDARY a/k/a JIM SIDNEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on November 30, 1967.

CITATIONS TO OPINIONS BELOW

The judgment and commitment of the District Court is unreported and is printed in Appendix B hereto, *infra*, p. A1. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. A4, is unreported to this date.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 30, 1967, and is set out in Appendix B, p. A4, *infra*. Rehearing was denied on February 12, 1968. On February 29, 1968, Mr. Justice White extended the time within which to file this petition for certiorari to and including April 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the trial judge abused the discretion given to him in Rule 17 (b) of the Federal Rules of Criminal Procedure as amended in denying the petitioner's request to have witnesses subpoenaed for the presentation of his defense as an indigent defendant.

2. Whether the order entered by the trial judge denying the defendant the right to have the vast majority of his witnesses subpoenaed at government expense was a violation of his right to have compulsory process for obtaining witnesses in his behalf as guaranteed by the Sixth Amendment to the United States Constitution.

3. Whether the ruling of the trial judge in denying the subpoenas requested deprived the defendant of his right to due process of law as guaranteed to him by the Fifth Amendment to the United States Constitution.

RULE INVOLVED

The rule involved is Rule 17 (b) of the Federal Rules of Criminal Procedure effective on the date of trial. The rule has since been amended, but the original text appears at Appendix A, *infra*, p. A1.

STATEMENT

The petitioner was an employee of the Speers Hereford Farms, later called American Hereford Farms, Inc. He had worked in various capacities with the Farms from May, 1961, to January, 1964, when his job as office manager was terminated. The indictment of the grand jury was returned on August 20, 1964, charging the petitioner with fourteen counts of mail fraud in violation of 18 U.S.C. §1341 and 18 U.S.C. §2, and one count of conspiracy incorporating all prior counts in violation of 18 U.S.C. §371. On December 23, 1965, a motion was filed with the trial court asking that an order issue from that court ordering the issuance of subpoenas to eighty-nine witnesses for the five original defendants, Stephen M. Speers, Jerry Anden, James V. Sidary, Emery Anden, Sr. and Emery Anden, Jr. A properly executed affidavit accompanied the motion indicating the name, address and testimony of witnesses requested. The petitioner requested that subpoenas issue to three veterinarians, two cattle buyers, three truck drivers, one herdsman and general manager, and eighty satisfied customers. All five defendants had been previously permitted to proceed *in forma pauperis* as indigent defendants. All these witnesses would have testified to the experience they had with the petitioner and the operations of Speers Hereford Farms and American Hereford Farms, Inc. On December 30, 1965, the trial court entered its order allowing subpoenas to issue to three veterinarians, two cattle buyers, two truck drivers, two satisfied customers from Kansas, and one satisfied customer from each of three states, Nebraska, Iowa and Missouri. The Court denied the defendants' motion on the other seventy-five satisfied customers.[1] The cause proceeded to trial on

1. At Volume I, page 140, record on appeal, a copy of the trial court's order appears.

January 10, 1966, in the Federal District Court for the District of Kansas at Topeka, Kansas. The government, respondent herein, was allowed to subpoena, over the repeated objections of petitioner's counsel, over one hundred thirty-six witnesses other than witnesses directly involved in the fifteen counts.[2] Not all of the more than one hundred thirty-six witnesses were called to testify by the respondent, but none were excluded by the Court. On February 4, 1966, after approximately four weeks of trial, the jury returned a verdict finding the defendant guilty on the first fourteen counts and not guilty on the fifteenth count of the indictment.[3]

On April 18, 1966, after a pre-sentence investigation report, the trial court sentenced the petitioner to eighteen months imprisonment on each of the fourteen counts, the sentences to run concurrently.[4] After denial of the motion for a new trial, the petitioner perfected an appeal to the United States Court of Appeals for the Tenth Circuit. The verdict and judgment of the trial court was affirmed[5] and a petition for rehearing was denied. The Circuit Court felt that the petitioner had been given an opportunity to present an adequate defense and that his Constitutional rights under the Sixth Amendment had been protected.

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2. Objections to witnesses called by the respondent as dissatisfied customers and for no other purpose are resplendent throughout the trial transcript.

3. Volume I, pages 228-9 of the record on appeal.

4. Volume I, p. 258 of the record on appeal.

5. Appendix B, *infra*.

REASONS FOR GRANTING THE WRIT

I.

The Limitation of Witnesses Requested by the Petitioner and the Failure to Limit Witnesses Requested by the Respondent Constituted an Abuse of Discretion by the Trial Court under Rule 17 (b) of the Federal Rules of Criminal Procedure Resulting in a Denial of the Petitioner's Constitutional Rights As Guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States.

Before Rule 17 (b) of the Federal Rules of Criminal Procedure was amended, effective July 1, 1966, the text of the rule as it applied to the case at bar provided that a Motion supported by an Affidavit should be submitted to the Court by the Defendant and should reflect the names, addresses and testimony of the witnesses sought to be subpoenaed. The Petitioner herein, joined in the Motion and Affidavit by other co-defendants requesting that a total of eighty-nine subpoenas issue to witnesses necessary for the presentation of a defense by the Petitioner at the trial of this case. The vast majority of the witnesses requested were customers who had dealt satisfactorily with Speer's Hereford Farms and American Hereford Farms, Inc. and with this Petitioner. A fundamental requisite in the proof of the Respondent's case herein was the necessity of showing a scheme or artifice on the part of the Petitioner to defraud customers with whom he dealt on behalf of his employer. The witnesses requested by the Petitioner were necessary to the Petitioner's defense in refuting the Respondent's allegation of a scheme to defraud. The trial court, on the other hand, allowed the Petitioner only five satisfied customers, two of whom were from Kansas and one each from the States of Nebraska, Iowa and Missouri. The severe and unreasonable limitation upon witnesses

allowed to the Petitioner by the trial court and classed as satisfied customers would appear to be for economic reasons only. It is respectfully submitted that a great many of the witnesses requested by the Petitioner were from the eastern part of the United States since the original situs of the operation of the farms was at Belle Vernon, Pennsylvania, and that because of the distance required for their travel the Court felt that the expense would be too great. However, pursuant to the rule for compulsory process of witnesses for indigent defendants, the trial court's discretion extends only in determining whether the witness is material to the defense and in turn whether the Petitioner cannot safely go to trial without the presence of the witness. It is submitted that in the instant case the Petitioner was not allowed a sufficient number of witnesses, classed as satisfied customers, to allow him to present an adequate defense in his own behalf. There is no question in this case but that the Petitioner was an indigent defendant proceeding *in forma pauperis* and entitled to the protection extended to him by Rule 17 (b) of the Federal Rules of Criminal Procedure.

As opposed to the unreasonable limitation imposed upon the Petitioner in restricting witnesses to be subpoenaed in the interest of his defense, the Respondent, without any restraint whatsoever, subpoenaed more than one hundred fifty witnesses at government expense from all parts of the nation. Only fourteen of the witnesses subpoenaed were necessary for the proof of the fourteen substantive counts charged against the Defendant. The record shows that the vast majority of the witnesses subpoenaed by the government and later called to the witness stand were dissatisfied customers. The record also shows that counsel for the Petitioner, throughout the course of the trial, repeatedly objected to the continual flow of the Re-

spondent's dissatisfied customers across the witness stand. There being no statutory restriction upon the calling of witnesses by the Respondent in this case, the Court did not have the opportunity to restrict the number of subpoenas requested by the Respondent. However, the Court clearly had the opportunity during the course of the trial to restrict the number of dissatisfied customers called to the stand by the Respondent. The only plausible reason for the calling of the vast number of dissatisfied customers by the Respondent is that they wanted to show that even apart from the fourteen count witnesses called, a general dissatisfaction with the way in which the business was operated existed. They further intended to indicate to the jury that the alleged scheme or artifice to defraud extended over a great many more people than the original fourteen counts alleged. The resulting prejudice to the Petitioner and the obvious abuse of discretion by the trial court in limiting his witnesses clearly appears in comparing the presentation of the Respondent's case and the limited presentation of the Petitioner's case. The vast majority of the 136 witnesses subpoenaed by the government, exclusive of count witnesses, were dissatisfied customers and when compared with the five satisfied customers allowed to the Petitioner, the jury was prejudicially overwhelmed by the Respondent's case. The trial court had the opportunity, had it seen fit to order the issuance of the subpoenas requested by the Petitioner, to allow the Petitioner the opportunity of defending against the many dissatisfied customers called by the Respondent. However, the trial court failed in its duty to allow the Petitioner to present an adequate defense.

The unreasonable limitation upon witnesses requested by the Petitioner and the failure of the trial court to sustain objections to the cumulative Respondent witnesses

resulted in a clear abuse by the trial court of its discretion under Rule 17 (b) of the Federal Rules of Criminal Procedure. That rule does not anticipate nor does it intend to allow a trial court, under the guise of discretion, to circumvent the vested statutory and constitutional rights of the Petitioner.

Pursuant to the Sixth Amendment of the United States Constitution the Petitioner is guaranteed the right to have compulsory process for obtaining witnesses in his favor. The logical result of an abuse of discretion by the trial court under Rule 17 (b) of the Federal Rules of Criminal Procedure is the violation and the infringement of the Petitioner's right under that Amendment. It is respectfully submitted that the Court has heretofore in its wisdom carefully interpreted and zealously guarded the rights of indigent defendants and that the right guaranteed to this Petitioner for the compulsory process for obtaining witnesses in his behalf is no less a right than his right to the assistance of counsel. A most recent case of this Court is the case of *Washington* v. *State of Texas,* 338 U.S. 14 (1967), dealing with the right to offer the testimony of witnesses and to compel their attendance, though not factually identical to the case at bar, it indicates the law applicable to the instant case. At page 19 of that opinion this Court said:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

Discretion of a trial judge can effectively destroy compulsory attendance of witnesses as it did in the instant case as surely as the Texas statute did in the *Washington* case. It is respectfully submitted that the interpretation

of the Sixth Amendment guarantee of compulsory process as set forth in that case applies to the case at bar.

Any denial or abridgement of the right to compulsory attendance of witnesses which results in a violation of the Petitioner's guarantee under the Sixth Amendment of the United States Constitution correspondingly results in a violation of the Petitioner's guarantee of due process of law as set forth in the Fifth Amendment of the United States Constitution. This Court, in the *Washington* case, *supra*, at page 19 said: "This right [compulsory attendance of witnesses] is a fundamental element of due process of law." Thus, the effect of this Court's decision in that case, through its clear and positive language, is to impose upon the trial judge the responsibility of protecting and insuring an indigent defendant's right to compulsory attendance of witnesses so as to guarantee him due process of law. The discretion provided for in Rule 17 (b) of the Federal Rules of Criminal Procedure should not be allowed to destroy the Petitioner's right to due process of law.

Rule 17 (b) in effect at the time of the trial provided as follows: "The Court or a judge thereof *may* order at any time that a subpoena be issued upon motion or request of an indigent defendant." (Emphasis added). However, the rule as amended and effective July 1, 1966, following the trial of this case, provides as follows: "The Court *shall* order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant. . . ." (Emphasis supplied). It is respectfully submitted that the substitution in the amended rule of the word "shall" for the word "may" in the original rule clearly diminishes or removes the discretion allowed to the trial court in the issuance of subpoenas to witnesses requested by indigent

defendants and brings the language and intent of the rule within the guarantees of the Sixth Amendment of the United States Constitution. It is submitted that the language of the rule in effect at the time of the trial rendered the rule unconstitutional as it permitted trial court discretion in the protection of an absolute and fixed right to compulsory process of witnesses. No trial court should have the discretion to effectively destroy an indigent defendant's constitutional guarantees. This Court has on many occasions established those rights as separate, equal and unequivocal.

II.

An Interpretive Decision by This Court on an Indigent Defendant's Right to Compulsory Process of Witnesses As Guaranteed by the Sixth Amendment in Light of Rule 17 (b) Is Needed.

It is respectfully submitted that this Court has not recently had the opportunity of rendering a decision based upon facts similar to the facts in the case at Bar. Certainly, the question presented in the instant case arises in a great many state and federal trial courts across this country. The bench and bar is in need of an interpretive decision which would correlate the rights of defendants under the Sixth Amendment with the language contained in Rule 17 (b) of the Federal Rules of Criminal Procedure. One of the most recent cases dealing with compulsory process of witnesses is the case of *Washington* v. *State of Texas, supra,* however, that case did not deal with a federal crime but rather with a state statute denying the right of a co-defendant to testify in behalf of an accused. The case at bar varies with the *Washington* case in that it involves one of the Federal Rules of Criminal Procedure

and the due process clause of the Fifth Amendment rather than the due process clause of the Fourteenth Amendment. This Court has in recent years done much to insure the rights of indigent defendants to the assistance of competent counsel for the presentation of their defense and it is likewise imperative that these same defendants have the opportunity to obtain compulsory process of witnesses in their favor. To have competent appointed counsel representing them and then to be unable to obtain the witnesses necessary to the presentation in their behalf of a defense by that appointed counsel renders the guarantee of competent assistance of counsel moot. Clearly the right to compulsory attendance of witnesses is no less a right or guarantee than that of the assistance of counsel. However, there are no recent interpretive decisions of this Court establishing the right to compulsory attendance of witnesses on an equal footing with the right to the assistance of able and competent counsel.

It is respectfully submitted that the opinion by the Circuit Court of Appeals for the Tenth Circuit does not give serious consideration to the Petitioner's constitutional rights. The opinion erroneously assumes that the trial court in denying all but five of the Petitioner's satisfied customers was allowing the Petitioner to present an adequate defense. The Circuit Court failed to interpret and equate the right of compulsory process with the other rights guaranteed under the Sixth Amendment of the United States Constitution.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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Attorneys for Petitioner

March, 1968.

APPENDIX A

Rule 17

(b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

APPENDIX B

Judgment and Commitment (Rev. 7-52)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

United States of America
v.
JAMES V. SIDARY, also known as JIM SIDNEY
No. T-CR-694

On this 8th day of April, 1966 came the attorney for the government and the defendant appeared in person and[1]

1. Insert "by counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

by court-appointed counsel Philip E. Buzick at Topeka, Kansas.

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty to Counts 1 through 14 returned by jury February 4, 1966 of the offense of devising and intending to devise a scheme and artifice to defraud and for obtaining money from prospective purchasers of Hereford cattle, residing in the State of Kansas and elsewhere, by means of false and fraudulent pretenses, representations and promises, knowing same to be false when made, and in furtherance of such scheme, among other acts, operated under various names, represented himself to the general public as a buyer, breeder, raiser and seller of Hereford cattle, placed and caused to be placed in authorized depositories for mail matter certain letters and envelopes to be sent and delivered by the Post Office Department of the United States and received certain checks which had been sent and delivered by the Post Office Department of the United States, all in violation of 18 USC 1341, as charged[3] in Counts 1 through 14 of Indictment of fifteen counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the Motion for a New Trial and Judgment for Acquittal filed herein by the defendant is hereby denied.

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2. Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

3. Insert "in count(s) number " if required.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] eighteen (18) months on each of Counts 1 through 14 of the Indictment, such sentences to run concurrently with each other, the defendant to be eligible for parole at such time as the United States Board of Parole may determine pursuant to 18 USC 4208(a)(2).

It Is Adjudged that[5] execution of said sentence is hereby stayed for a period of ten (10) days.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

APPROVED:

/s/ James R. Ward
Assistant U. S. Attorney

/s/ George Templar
United States District Judge.

.....,
Clerk.

The Court recommends commitment to:[6]

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4. Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

5. Enter any order with respect to suspension and probation.

6. For use of Court wishing to recommend a particular institution.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
SEPTEMBER TERM - 1967

STEPHEN M. SPEERS, JERRY D. ANDEN, and JAMES V. SIDARY, a/k/a JIM SIDNEY, Appellants, v. UNITED STATES OF AMERICA, Appellee.	Nos. 9245 9246 9247

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Harvey D. Ashworth, Topeka, Kansas, for appellant James V. Sidary. John William Mahoney, Kansas City, Kansas, for appellants Stephen M. Speers and Jerry D. Anden.

James R. Ward, Assistant U. S. Attorney, Topeka, Kansas, (Newell A. George, U. S. Attorney, Topeka, Kansas, with him on brief) for appellee.

Before MURRAH, Chief Judge, WILBUR K. MILLER* and HICKEY, Circuit Judge.

HICKEY, Circuit Judge

Appellants Speers, Anden and Sidary were charged with violating the mail fraud statute, 18 U.S.C. §1341, aiding, abetting and counseling, 18 U.S.C. §2, and conspiring to violate the mail fraud statute, 18 U.S.C. §371. A jury found Speers and Anden guilty on all counts. Sidary was acquitted of conspiracy, but found guilty on all other counts.

*Senior Circuit Judge for the District of Columbia, sitting by designation.

The appellants filed separate motions for acquittal, a new trial, and for a new trial on the basis of newly discovered evidence. After a hearing, the trial court denied all of the motions.

This appeal presents the following points for review:

1. Sufficiency of the evidence.

2. Abuse of court's discretion in denying certain witnesses requested by appellants at government expense.

3. Failure of instructions to call equal attention to appellants' evidence which, if believed by the jury, should require verdicts of not guilty.

4. Alleged misconduct of government counsel in failing to make government witnesses not called to testify available for interview by accused and their counsel.

5. Alleged misconduct of a government investigator who inspected and made copies of records of the accused without permission or court order.

6. Alleged error in admitting testimony of a government agent who related defendant Speer's statement to him, "We know of a couple of tricks you fellows haven't heard of next time we start up."

7. Alleged error in questions propounded on cross-examination to appellant Speers.

8. Alleged error in not granting an acquittal to appellant Sidary on the ground that the verdict of acquittal on the conspiracy count is inconsistent with verdicts of guilty on the mail fraud counts.

9. Alleged error in denying motion for new trial on ground of newly discovered evidence.

Speers conceived a plan to establish an area market for feeder calves. Calves were purchased in areas where they were plentiful, trucked to farms which were located in desirable market areas, and sold to a customer market created by the appellants. The purchasers in the scarce market areas were solicited on a per-head basis. Trucks were used to deliver the worked lots of calves to the order-purchaser at his farm or feed lot. A certified check was demanded before unloading began.

Anden became an employee of Speers in the initial operation and when the business expanded and Speers incorporated, Anden purchased stock in the newly formed corporation and became one of the executive officers, as did Speers. Sidary also was employed early in the development of the business and rose from truck driver and stock handler to office manager of the fast growing enterprise.

Inquiries were invited through advertising in livestock trade journals. As the inquiries were received, solicitations to purchase in the nature of brochures were mailed out with letters representing the type and grade of animal to be sold. The advertisements, brochures and letters all misrepresented the quality of the cattle. In addition, misrepresentations were made in telephone solicitations which were under the direction of office manager Sidary. Sidary also handled office correspondence and replied to inquiries, made representations and settled claims.

Numerous exhibits are included in the record and they include the advertisements, brochures, correspondence and the credit memos which reflect the efforts to settle loss claims. The record also contains a sizeable transcript of the testimony of purchasers, some of whom

complained and others who were satisfied. Also included is testimony of veterinarians who examined and treated the animals and testimony of government agents of the Enforcement Division of the Packers and Stockyards Act.

The fundamental rules for determining whether a motion for acquittal should be granted are: (a) the evidence must be considered in the light most favorable to the government, and (b) the verdict of the jury will not be set aside if supported by substantial evidence. The basic propositions and the test for reviewing the sufficiency of the evidence are set out in Cartwright v. United States, 335 F.2d 919 (10th Cir. 1964), and cases cited therein. Upon application of the rules referred to above, we find the jury's verdict is supported by substantial evidence.

It was argued this was a legitimate business venture that did not work out successfully; however, "[t]hat. . . was a question of fact, to be determined by the jury after considering all of the evidence and the inferences to be drawn therefrom." Beck v. United States, 305 F.2d 595, 598 (10th Cir. 1962); Wall and Lund v. United States, Nos. 9007-9008, September Term, 1967 ..... F.2d ..... (10th Cir. 1967). The jury made the determination. We will not disturb it.

Appellants requested that 80 witnesses, who would testify they were satisfied customers, be subpoenaed at government expense. Exercising its discretion under Fed. R. Crim. P. 17(b), the court allowed twelve witnesses to be subpoenaed at government expense, five of whom were satisfied customers. It is contended that the court abused its discretion. However, in argument to the jury it was said by appellants' counsel, "We asked permission to bring in witnesses, because these guys are indigent, at the Government (sic) expense and the Government rightly limited

us to what we could have." Thus, it was recognized during the argument that the court did not abuse its discretion. We find no reason to disagree. "A motion to have a defense witness produced at government expense is addressed to the sound judicial discretion of the court and is not an absolute right." Murdock v. United States, 283 F.2d 585, 587 (10th Cir. 1960).

It is contended that amended Rule 17(b) reflects the theory of the Sixth Amendment guarantee and, therefore, because of the Sixth Amendment, no exercise of discretion should be tolerated. We do not speculate on future interpretations of the Sixth Amendment. However, it is important to note that Rule 17(b) presently provides that witnesses will be provided "upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense." Therefore, an indigent still must show that the witness is necessary to an adequate defense, just as he had to make such a showing under the former version of Rule 17(b). Appellants have failed to show why the new rule requires the disavowance of the thinking expressed in Feguer v. United States, 302 F.2d 214 (8th Cir. 1962) which recognized the right to compulsory process for an accused as guaranteed by the Sixth Amendment but also observed "that this right does not necessarily include the payment by the government of the expenses of witnesses." Id. at 241, citing Casebeer v. Hudspeth, 121 F.2d 914, 916 (10th Cir. 1941).

The court exercised its discretion and permitted the subpoena at government expense of witnesses necessary to an adequate defense.

We have the instructions submitted for review but unlike the cases cited by appellants, we do not have the

written request for instructions before us to compare them with because none were submitted. Neither do we have a distinct statement of the omissions to compare with what has been given as is prescribed in Fed. R. Crim. P. 30.

"In a criminal case, it is reversible error for a trial judge to refuse to present adequately a defendant's theory of defense, especially where a proper request therefor is proffered. [Citations omitted]." United States v. Blane, 375 F.2d 249, 252 (6th Cir. 1967). We examined the instructions as a whole to determine whether the defendants' theory of defense was adequately presented. Beck v. United States, supra at 599. The court recited the contentions of the appellants and, in effect, instructed that good faith and an honest purpose on the part of the accused is a good or complete defense to the offenses charged in the indictment. Beck v. United States, supra, was complied with. Also see, Elbel v. United States, 364 F.2d 127 (10th Cir. 1966) "The instructions protected defendant's rights." Barnhill v. United States, 96 F.2d 116, 122 (10th Cir. 1938).

When it was learned that some witnesses subpoenaed by the government would not be called, appellants were given the permission of the court to interview them and use whomever would aid in the defense. Appellants contend the government excused the witnesses "but did not advise appellants of their names until after all the witnesses had left." The trial court reviewed this charge after the trial and found no prejudice against the accused. Appellants have not alleged, in their motion for new trial on the ground of newly discovered evidence, any matters which these interviews would have disclosed. We have found no showing that the witnesses were likely to have information which would be helpful in preparing a defense nor is it shown how the absence of such information handicapped the accused either in making out an affirmative

defense or in meeting the prosecution's case. The number of satisfied customers had no bearing upon whether one or more witnesses who testified were defrauded by a scheme where the mail was used.

It is contended that government agents were guilty of misconduct when they inspected records of appellants and made copies of them at a time when the government was in the process of preparing its case against appellants.

It is admitted that Sidary, as office manager, consented to the examination of the records. It is also admitted that appellants' corporation was registered under the Packers and Stockyards Act, 7 U.S.C. §203. Section 222 of the Act provides: "The Secretary [Secretary of Agriculture] in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this chapter in any part of the United States." Further, the corporation could not refuse to disclose any matter which the Packers and Stockyards Act required it to record, report or disclose. Model Code of Evidence, Rule 207 (1942). Imperial Meat Company v. United States, 316 F.2d 435 (10th Cir. 1963); Amato v. Porter, 157 F.2d 719 (10th Cir. 1946). We, therefore, find no misconduct on the part of the agents because they had authority given them by Congress to prosecute an inquiry.

Appellant Speers contends that testimony given by an agent of the Enforcement Division of the Packers and Stockyards Act which related a remark of Speers—"We know of a couple of tricks you fellows haven't heard of next time we start up"—was prejudicial to the accused. This testimony would show the frame of mind or intent of the witness. Therefore, it was clearly within the trial judge's discretion to admit or deny. The trial judge exercised his discretion and we find it was not abused. No

objection was made to this testimony during the trial and it was not raised by the motions being reviewed.

It is also contended the cross-examination of Speers was prejudicial. Wide latitude is permitted in cross-examining an accused when the examiner seeks to destroy his credibility. The ruling on objections is within the sound discretion of the trial judge. The issue was not raised in the motions being considered.

Sidary contends that his acquittal on the conspiracy count requires his acquittal on the substantive counts. This court recently held: "[S]ince each count in an indictment is a separate offense, consistency in the verdict is not necessary." Maxfield v. United States, 360 F.2d 97, 99 (10th Cir. 1966). The case reaffirmed Burns v. United States, 286 F.2d 152, 155 (10th Cir. 1961).

The final contention is that the court erred in overruling the motion for new trial on the grounds of newly discovered evidence. The contention is answered by this court's rule that the motion is addressed to the sound discretion of the trial judge and his action will not be disturbed unless there is a showing of abuse of discretion. Robinson v. United States, 345 F.2d 1007, 1011 (10th Cir. 1965).

We have reviewed this voluminous record in detail and find that the trial court conducted a rather difficult case with extreme care in order to protect all of the rights of the accused.

We find no error affecting any substantial rights and, therefore, affirm the trial court.

AFFIRMED.

LIBRARY
SUPREME COURT, U. S.
FILED
MAY 1 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

JAMES V. SIDARY a/k/a JIM SIDNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1249

JAMES V. SIDARY a/k/a JIM SIDNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 4-11) is reported at 387 F.2d 698.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1967. A petition for rehearing was denied on February 12, 1968. On February 29, 1968, Mr. Justice White extended the time for filing a petition for a writ of certiorari to April 12, 1968, and the

petition was filed on March 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in this mail fraud case, the trial judge properly exercised his discretion in limiting the number of witnesses for the defense to be subpoenaed at government expense.

RULE INVOLVED

Rule 17(b), Federal Rules of Criminal Procedure, in effect until July 1, 1966, provided in pertinent part:

> The court or a judge thereof may order at any time that a subpoena be issued on motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness, and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. * * *

Rule 17(b), Federal Rules of Criminal Procedure, effective July 1, 1966, provides in pertinent part:

> The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon

a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. * * *

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner (who was tried with four others) was convicted on fourteen counts charging him with mail fraud in the sale of Hereford cattle (18 U.S.C. 1341).[1] On April 18, 1966, he was sentenced to eighteen months' imprisonment on each count, the sentences to run concurrently and to be subject to the provisions of 18 U.S.C. 4208 (a) (2).

The government's case consisted of the testimony of eighty witnesses, of whom approximately half were former customers of petitioner and his codefendants. This evidence, the sufficiency of which is not in issue, showed that petitioner was the office manager of a cattle business owned and controlled by codefendants. The business, Speers Hereford Farms,[2] which had its offices in Kansas and "farms" in Pennsylvania and Utah, solicited inquiries for its Hereford cattle through advertisements in livestock journals (*e.g.*, G. Exh. 10). When inquiries were received, petitioner would send out letters and brochures (*e.g.*, G. Exh. 71), representing the weight and quality of the cattle being offered for sale. In addition, petitioner and

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[1] He was found not guilty of conspiracy to commit the above offenses.

[2] The name was later changed to American Hereford Farms.

other employees of the company made direct representations that the cattle to be sold were produced on their "farms" from their own herd, or from neighboring farms using the company's breeding stock (*e.g.*, Tr. 131, 169, 348),[3] and that the cattle were purebred Herefords (*e.g.*, Tr. 958, 1089-1090, 1255). In fact, the cattle were not purebred Herefords,[4] were underweight and often diseased; they were purchased by petitioner and his codefendants at livestock auctions and merely sent to the "farms" for a few days to await reshipment.

The defense interposed was that of good faith. Fourteen witnesses, of whom five were satisfied customers, testified for the defendants. Letters from eighteen satisfied customers—alleged to be "just a representative group"—were introduced in evidence (Tr. 2845). In addition, an accountant, who had examined the records of the company for the year May 1962-1963, testified that only about twelve percent of the purchasers, representing approximately ten percent of the cattle sold, had made written complaints to the company concerning the cattle (Tr. 2748-2750).[5]

Prior to trial, petitioner joined in a motion made by two codefendants to subpoena eighty-nine wit-

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[3] "Tr." refers to the transcript of trial proceedings, lodged with the Clerk of this Court.

[4] Some were not even part Hereford (*e.g.*, Tr. 180, 364, 454).

[5] The cattle sold for the year as to which the accountant testified numbered around thirty-five thousand, and the gross receipts were $3,329,000.

nesses at government expense. Attached to the motion was an affidavit setting forth, *inter alia*, the expected substance of the witnesses' testimony. Requested were three veterinarians who would testify to the care that the cattle received prior to shipment, two cattle buyers who would testify that the defendants never purchased substandard or diseased cattle, three truckdrivers and a herdsman who would testify to defendants' efforts to assure healthy delivery of the cattle, and eighty witnesses from all over the country who would testify that they were saisfied customers of defendants (R. 55-61). The trial judge granted the motion as to the veterinarians and cattle buyers, but denied it as to the truckdrivers and herdsman. He permitted the defense to subpoena five of the allegedly satisfied customers: two from Kansas, and one each from Missouri, Iowa, and Nebraska. In addition he permitted the defendants to subpoena at government expense the accountant who had examined the books of the defendants' companies. The motion to subpoena an additional seventy-five allegedly satisfied customers was denied (R. 140-141).

ARGUMENT

Petitioner contends that under the Sixth Amendment the trial judge was without discretion to deny the motion to subpoena eighty satisfied customers at government expense and that in any event the ruling was an abuse of discretion.

It is, however, well-settled that a district judge has discretion under Rule 17(b), F.R. Cr. P. to refuse to permit certain witnesses to be subpoenaed at the ex-

pense of the government.[6] *E.g.*, *Taylor* v. *United States*, 329 F.2d 384, 386 (C.A. 5); *Reistroffer* v. *United States*, 258 F.2d 379, 396 (C.A. 8), certiorari denied, 358 U.S. 927; *Murdock* v. *Untied States*, 283 F.2d 585, 587 (C.A. 10), certiorari denied, 366 U.S. 953; *Feguer* v. *United States*, 302 F.2d 214, 241 (C.A. 8), certiorari denied, 371 U.S. 872. The principal purpose of endowing the district judge with discretion is to empower him to curtail abuses by defendants of the right to summon witnesses for their defense at the government's expense. Here the calling of eighty satisfied customers would clearly have been an abuse. Evidence that there were satisfied customers, while legally relevant on the issue of fraudulent intent, nevertheless bears collaterally, rather than directly, on that issue. See *Worthington* v. *United States*, 64 F.2d 936 (C.A. 7). Although the failure to permit the defense to introduce any such testimony might be error, *United States* v. *Shavin*, 287 F.2d 647 (C.A. 7), it is well established that the number of satisfied-customer witnesses that a defendant may call, even at his own expense, may be limited in the interests of sound judicial management. *Chapa* v. *United States*, 261 Fed. 775 (C.A. 5), certiorari denied, 252 U.S. 583; *Samuels* v. *United States*, 232 Fed. 536 (C.A. 8); cf. *Burgman* v. *United States*, 188 F.2d 637, 641-642 (C.A.D.C.), certiorari denied, 342 U.S. 838. The limitation to five such wit-

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[6] As the court of appeals noted (Pet. App. 8), nothing in amended Rule 17(b), effective July 1, 1966, indicates that the trial court's discretion in this regard was intended to be diminished.

nesses from surrounding states, whom petitioner and his codefendants might subpoena at government expense, was not unreasonable.

The jury was apprised, from the letters of satisfied customers introduced, and from the testimony of the accountant, that many of defendants' customers apparently found no cause for complaint. The evidence thus adequately placed before the jury the issue whether there was a scheme to defraud.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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